

1 DUANE M. GECK (State Bar No. 114823)
2 Email: dm@severson.com
3 DAVID E. PINCH (State Bar No. 124851)
4 Email: dep@severson.com
5 DONALD H. CRAM, III (State Bar No. 160004)
6 Email: dh@severson.com
7 SEVERSON & WERSON
8 A Professional Corporation
9 One Embarcadero Center, Suite 2600
10 San Francisco, CA 94111
11 Telephone: (415) 398-3344
12 Facsimile: (415) 956-0439

13 Attorneys for Plaintiff Ford Motor Credit Company, LLC

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN JOSE DIVISION

17 FORD MOTOR CREDIT COMPANY,
18 LLC, a Delaware Limited Liability
19 Company,

20 Plaintiff,

21 vs.

22 LEWIS FAMILY ENTERPRISES, INC.,
23 dba BOB LEWIS LINCOLN
24 MERCURY, a California corporation,
25 and STEVEN ROBERT LEWIS, an
26 individual,

27 Defendants.
28

No. C 07-03301 RS

**FORD CREDIT'S
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF EX PARTE
APPLICATION FOR WRIT OF
POSSESSION AND FOR
TEMPORARY RESTRAINING
ORDER**

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. STATEMENT OF FACTS	2
A. Ford Credit Loan Agreements With Bob Lewis Lincoln Mercury	2
B. Capital Loan Agreement	4
III. GROUNDS FOR ISSUING ORDER FOR WRIT OF POSSESSION.....	8
A. Ford Credit Is Entitled To A Writ Of Possession	8
1. Ford Credit Has Established The Probable Validity Of Its Claims To Possession Of The Collateral.....	10
2. The Court May Issue An <i>Ex parte</i> Writ Of Possession.....	10
3. The Court Should Order Bob Lewis Lincoln Mercury To Turn Over The Vehicles and Sales Income To Ford Credit.....	11
4. The Court Should Order a Preliminary Injunction to Protect the Collateral Pending Turnover or Seizure	12
5. The Court should Order the Levying Officer to Enter Dealers' Business if Necessary to Recover the Property	12
6. Any Re-Delivery Bond Should Be Set At The Full Value Of The Collateral.....	13
B. Ford Credit Seeks A TRO And Preliminary Injunction If The Court Does Not Issue The Writ Of Possession	14
1. A Temporary Restraining Order Should Issue To Protect the Collateral.....	15
2. Ford Credit Has Established Grounds For Issuance of a TRO.....	15
3. The TRO Must Contain Terms Which Protect Ford Credit's Interests In The Collateral.....	16
C. Preliminary Injunction.....	17
IV. CONCLUSION	19

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>America West Airlines, Inc. v. National Mediation Board</i> , 119 F.3d 772 (9th Cir. 1997).....	19
<i>Arcamuzi v. Continental Air Lines, Inc.</i> , 819 F.2d 935 (9th Cir. 1987).....	19
<i>Big Country Food, inc. v. Board of Educ. of Anchorage School Dist.</i> , 868 F.2d 1085 (9th Cir. 1989).....	18
<i>Los Angeles Memorial Coliseum v. National Football League</i> , 634 F.2d 1197 (9th Cir. 1980).....	19
<i>Schneider v. California Department of Corrections</i> , 91 F. Supp. 1316 (N.D.Cal. 2000),	18
<i>Sierra On Line, Inc. v. Phoenix Software, Inc.</i> , 739 F.2d 1415 (9th Cir. 1984).....	18
State Cases	
<i>Blair v. Pitchess</i> , 5 Cal. 3d 258 (1971).....	9
<i>Sea Rail Truckloads, Inc. v. Pullman, Inc.</i> , 131 Cal. App. 3d 511 (1982).....	8
<i>Symes Cadillac Inc. v. Insurance Co. of North America</i> , (1977) 66 Cal. App. 3d 905	13
<i>Walter International Corp. v. Khorsandi</i> , 69 Cal. App. 4th 1261 (1999).....	8
Statutes and Rules	
California Code of Civil Procedure	
§510.010	8
§ 511.010	2, 8, 15
§511.090	10
§512	13
§512.010	9
§512.020	11

1	§512.060	13
2	§512.070	9, 11
3	§513.010	2, 9, 12, 15
4	§515.020	14
5	§526(a).....	2, 17
6	F.R.Civ.P. Rule 64	2, 8, 15
7	F.R.Civ.P. Rule 65	2, 15

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

I. INTRODUCTION

Plaintiff, Ford Motor Credit Company, ("Ford Credit") applies *ex parte* for a writ of possession to recover its collateral from defendant, Lewis Family Enterprises, Inc., dba Bob Lewis Lincoln Mercury, a California corporation, (hereinafter "Bob Lewis Lincoln Mercury").

Ford Credit has provided wholesale flooring financing to Bob Lewis Lincoln Mercury in its motor vehicle sales business. This financing permitted Bob Lewis Lincoln Mercury to acquire inventories of new and used vehicles ("the Vehicles"). Ford Credit secured its flooring loans by, among other things, the Vehicles and other personal property such as parts, accessories, furniture, fixtures and equipment.

Bob Lewis Lincoln Mercury has defaulted on its vehicle wholesale financing contract and has refused to turn over the Vehicles and other secured collateral following Ford Credit's lawful demand. Bob Lewis Lincoln Mercury is in default because it has sold inventory and has failed to pay off the related Ford Credit liens upon sale. This practice is referred to as a "sales out of trust" or "SOT." In total, Bob Lewis Lincoln Mercury has sold several vehicles out of trust amounting to a \$497,754.70 SOT balance. The SOT is a conversion of money held in trust for Ford Credit.

Through this Ex Parte Application Ford Credit seeks a Court order directing the United States Marshal for the Northern of California to recover the Vehicles and other collateral from Bob Lewis Lincoln Mercury and to deliver them to Ford Credit.

As is set forth in greater detail below and in the accompanying declaration of Phil Ward who is Ford Credit's Territory Sales Manager responsible for the Fresno Territory of the Western Region of Ford Credit, *ex parte* relief is necessary to obtain immediate possession of the vehicles to preserve the economic value of the

1 depreciating, saleable and moveable collateral. Bob Lewis Lincoln Mercury's total
 2 debt to Ford Credit stands in excess of \$2,600,000.00; Bob Lewis Lincoln
 3 Mercury's dubious ability to pay is evident from its repeated sales out of trust. The
 4 vehicles may be Ford Credit's only repayment source. To mitigate its damages,
 5 Ford Credit must take affirmative steps to recover the vehicles; otherwise, it will be
 6 irreparably damaged through Bob Lewis Lincoln Mercury's conversion of the
 7 vehicles and the loss of the sales proceeds. For these reasons, Ford Credit moves
 8 that the Court grant its *ex parte* application for writ of possession under California
 9 Code of Civil Procedure ("CCP") § 511.010, *et seq.* as incorporated by F.R.Civ.P.
 10 Rule 64.

11 In addition, Ford Credit applies for injunctive relief under ("CCP") §513.010
 12 and §526(a) as incorporated by F.R.Civ.P 65 respectively.
 13

14 II. STATEMENT OF FACTS

15 Plaintiff Ford Credit is, and at all material times has been, a Delaware
 16 corporation, having its principal place of business in the State of Michigan. (Ward
 17 Decl. ¶3)

18 Bob Lewis Lincoln Mercury is a California corporation with its principal
 19 place of business in Plumas County at 911 Capitol Expressway Auto Mall, San
 20 Jose, California. (Ward Decl. ¶24).

21 A. Ford Credit Loan Agreements With Bob Lewis Lincoln 22 Mercury

23 Ford Credit and Bob Lewis Lincoln Mercury entered into an agreement
 24 entitled Automotive Wholesale Plan for Wholesale Financing and Security
 25 Agreement dated December 12, 2003, ("Wholesale Agreement"). (Ward Decl. ¶4,
 26 Exhibit "A"). Under the Wholesale Agreement, Ford Credit provided Bob Lewis
 27 Lincoln Mercury inventory financing for the acquisition of new and used motor
 28

1 vehicles for sale and lease through Bob Lewis Lincoln Mercury's retail
2 automotive sales business.

3 Under the Wholesale Agreement, Bob Lewis Lincoln Mercury granted Ford
4 Credit a security interest in all:

5 As security for all Advances now or hereafter made by Ford Credit
6 hereunder, and for the observance and performance of all other
7 obligations of Dealer to Ford Credit in connection with the
8 wholesale financing of Merchandise for Dealer, Dealer hereby
9 grants to Ford Credit a security interest in the Merchandise
10 wherever located now owned or hereafter acquired by Dealer,
11 accessions thereto, accessories and replacement parts therefore, and
12 in the proceeds and products thereof in whatever form, of any sale
13 or other disposition of the Merchandise or other collateral, and in
14 accounts, instruments, chattel paper, general intangibles, contract
rights documents and supporting obligations arising from the
disposition of the Merchandise or other collateral; and Dealer
hereby assigns to Ford Credit, and grants to Ford Credit a security
interest in, all amounts that may now or hereafter be payable to
Dealer by the manufacturer, distributor or seller of any of the
Merchandise by way of rebate or refund of all or any portion of the
purchase price thereof.

14 (Ward Decl. ¶5, Exhibit "A").

15 On December 12, 2003, Bob Lewis Lincoln Mercury entered into a Security
16 Agreement with Ford Credit under which Bob Lewis Lincoln Mercury granted
17 Ford Credit a security agreement in :

- 18 a. All equipment, fixtures, furniture, demonstrators and
19 service vehicles, supplies and machinery and other
20 goods of every kind.
- 21 b. All motor vehicles, tractors, trailers, service parts and
22 accessories and other inventory of every kind and
23 accession thereto.
- 24 c. All accounts, instruments, chattel paper and general
25 intangibles, contract rights, documents and
26 supporting obligations thereto.

27 (Ward Decl. ¶6, Exhibit "B").

B. Capital Loan Agreement

On or about January 13, 2004, Ford Credit and Bob Lewis Lincoln Mercury entered into a Master Loan and Security Agreement and Supplement thereto (“Capital Loan Agreement”). (Ward Decl. ¶7, Exhibit “C”). Under the Capital Loan Agreement, Ford Credit lent Bob Lewis Lincoln Mercury \$800,000.00 to be repaid with interest as set forth in the agreement.

The Capital Loan Agreement includes a cross-default provision by which a default under any security document or other agreement between Bob Lewis Lincoln Mercury and Ford Credit is a default under the Capital Loan Agreement and Ford Credit is entitled to accelerate the loan balance that Bob Lewis Lincoln Mercury owes to it under that Capital Loan Agreement. (Ward Decl. ¶9).

Under the Capital Loan Agreement, Bob Lewis Lincoln Mercury granted Ford Credit a security interest in specific collateral. The collateral includes the vehicles identified in the Loan Agreement. The complete description of the collateral is as follows:

The term “Collateral” shall mean, collectively, all of the personal property now owned or hereafter acquired by [Bob Lewis Lincoln Mercury], including without limitation (1) all equipment, fixtures, furniture, demonstrators and service vehicles, supplies and machinery and other goods of every kind, (2) all motor vehicles, tractors, trailers, implements, service parts and accessories and other inventory of every kind and an accessions thereto, (numbers (1) and (2) above collectively referred to as the Personalty”) and (3) all accounts, instruments, chattel paper, general intangibles, contract rights documents and supporting obligations thereto (collectively, the “Intangibles”).

(Ward Decl. ¶10).

1 The collateral identified under the Wholesale Agreement, the Security
2 Agreement, and the Loan Agreement is collectively referred to as the “Collateral”.

3 Ford Credit perfected its security interests in the Collateral by filing a UCC-
4 1 financing statement with the Office of the Secretary of State of California on
5 October 28, 2003, as document number 0330360194. (Ward Decl. ¶12, Exhibit
6 “D”).

7 All of the loan and security agreements identified above as Exhibits “A”
8 through “D”, inclusive, are collectively referred to as the “Loan Documents”.

9 Ford Credit has performed all conditions, covenants and promises required
10 of it in accordance with the terms and conditions of the Bob Lewis Lincoln
11 Mercury Loan Documents. (Ward Decl. ¶14). Bob Lewis Lincoln Mercury,
12 however, has defaulted on its obligations under the Wholesale Agreement. Bob
13 Lewis Lincoln Mercury has sold vehicles and failed to repay Ford Credit creating
14 the SOT condition. Bob Lewis Lincoln Mercury owes Ford Credit for principal,
15 interest and other charges constituting an SOT under the Wholesale Agreement in
16 the approximate sum of \$497,754.70 as of June 13, 2007. (Ward Decl. ¶16). Ford
17 Credit did not know of this SOT balance until it conducted an audit of Bob Lewis
18 Lincoln Mercury’s inventory and books on June 13, 2007. (Ward Decl. ¶16). A
19 copy of the spreadsheet that identifies each vehicle sold by vehicle sold, date of
20 sale, and balance owed is attached to the Declaration of Phil Ward as Exhibit “E”.

21 As a result of these defaults and through this lawsuit, Ford Credit is
22 exercising its rights under its Security Agreements to accelerate the remainder of
23 the payments due for the financing of the vehicle inventory. This right is granted
24 to Ford Credit under the Capital Loan Agreement at ¶7(b)(1) which states: “Lender
25 may declare the unpaid portion of the indebtedness to be immediately due and
26 payable, without further notice or demand each of which is hereby expressly
27 waived by [Bob Lewis Lincoln Mercury]” and under the Wholesale Agreement at
28

1 ¶9(d) which provides: “Upon the occurrence of an Event of Default Ford Credit
2 may accelerate, and declare immediately due and payable, all or any part of the
3 unpaid balance and flat charges, without notice to anyone”. (Ward Decl. ¶¶17, 22).

4 Ford Credit has demanded that Bob Lewis Lincoln Mercury pay the amounts
5 owing, but Bob Lewis Lincoln Mercury has failed and refused to make payment.
6 As of June 15, 2007, the total principal loan balance that Bob Lewis Lincoln
7 Mercury owes to Ford Credit under the Wholesale Agreement is \$2,333,494.56
8 together with interest as provided under the Wholesale Agreement. (Ward Decl.
9 ¶18).

10 Under the Capital Loan Agreement a default under any other agreement
11 between Ford Credit and Bob Lewis Lincoln Mercury is a default under the Capital
12 Loan Agreement. As a result of Bob Lewis Lincoln Mercury’s default, Ford Credit
13 elects to accelerate the balance that Bob Lewis Lincoln Mercury owes to it under
14 the Capital Loan Agreement. (Ward Decl. ¶19).

15 As of June 15, 2007, Bob Lewis Lincoln Mercury owes Ford Credit under
16 the Capital Loan Agreement the amount of \$269,114.82. Interest continues to
17 accrue at the rate stated in the Capital Loan Agreement. (Ward Decl. ¶20).

18 By reason of Bob Lewis Lincoln Mercury's defaults as alleged above and
19 pursuant to the terms of the Wholesale Agreement at ¶9(d) Ford Credit can demand
20 that Bob Lewis Lincoln Mercury assemble the Collateral and make it available to
21 Ford Credit at such place or places as Ford Credit shall reasonably request. And
22 pursuant to the Capital Loan Agreement at ¶7(d), Ford Credit is entitled to
23 immediate possession of the Collateral in which Ford Credit holds a security
24 interest. (Ward Decl. ¶22).

25 Ford Credit has made lawful demand upon Bob Lewis Lincoln Mercury to
26 assemble and deliver the Collateral to Ford Credit. But despite Ford Credit’s
27 demand upon Bob Lewis Lincoln Mercury to assemble and deliver the Collateral,
28

1 Bob Lewis Lincoln Mercury has failed and refused to deliver possession of the
2 Collateral to Ford Credit. Bob Lewis Lincoln Mercury remains in possession of
3 the Collateral in defiance of Ford Credit's security interest and contractual rights to
4 possession. Ford Credit has inspected the Bob Lewis Lincoln Mercury sales lot at
5 911 Capitol Expressway Auto Mall, San Jose, California and attests that the
6 Collateral, including the vehicle inventory is located and kept at Bob Lewis
7 Lincoln Mercury's principal place of business. (Ward Decl. ¶¶23 - 25).

8 As of June 15, 2007, the total value of the vehicle inventory subject to Ford
9 Credit's security interest is approximately \$2,287,804.15. The new vehicles are
10 valued at Bob Lewis Lincoln Mercury's dealer invoice for the acquisition of the
11 new vehicles at \$2,181,193.18. The used vehicles are valued at 70% of the original
12 floored balance, at \$106,610.97. The 70% of the original floored balance is based
13 upon Ford Credit's experience in selling similar new and used motor vehicles. A
14 copy of the Ford Credit's valuation of each motor vehicle by make, model, year,
15 and vehicle identification number is attached to the Declaration of Phil Ward as
16 Exhibit "F". (Ward Decl. ¶26).

17 The parts, accessories, equipment, furniture and fixtures are valued at
18 \$298,350.00. Ford Credit has adopted Bob Lewis Lincoln Mercury's values for
19 these items from its own statement of dealer assets. (Ward Decl. ¶27, Exhibit "G").

20 Ford Credit is informed and believes and alleges that the Collateral in which
21 Ford Credit has a security interest has not been taken for a tax, assessment or fine
22 pursuant to statute, or seized under any execution against the property. (Ward
23 Decl. ¶29).

24 Bob Lewis Lincoln Mercury's wrongful conduct in failing to turn over to
25 Ford Credit the Collateral, including, but not limited to, the proceeds, has caused
26 and will continue to cause great and irreparable injury to Ford Credit unless and
27 until Bob Lewis Lincoln Mercury is enjoined and restrained by order of this Court.

1 This is because Bob Lewis Lincoln Mercury's retention of the Collateral allows it
 2 to use Ford Credit's collateral for purposes other than repaying the obligations
 3 owed to Ford Credit. This results in a dissipation of the Collateral. Because the
 4 motor vehicles in Bob Lewis Lincoln Mercury's possession are depreciating in
 5 value, Ford Credit suffers a corresponding depletion of the value of the security
 6 available to repay the Bob Lewis Lincoln Mercury obligations.

7 Ford Credit is also at risk because the vehicle inventory is rolling stock
 8 which can be easily removed from the business premises and hidden to prevent
 9 Ford Credit from recovering all or some of its Collateral.

10 Ford Credit has no adequate remedy at law for the injuries that it will suffer
 11 if Bob Lewis Lincoln Mercury retains the Collateral (including the motor vehicles
 12 and proceeds) in defiance of Ford Credit's rights. Because of the recent SOT
 13 condition, the solvency and ability of Bob Lewis Lincoln Mercury to pay damages
 14 is in grave doubt. It is not possible for Ford Credit to determine the precise amount
 15 of damages it will suffer if the Court does not restrain and enjoin Bob Lewis
 16 Lincoln Mercury's conduct.

17 **III. GROUNDS FOR ISSUING ORDER FOR WRIT OF** 18 **POSSESSION**

19 **A. Ford Credit Is Entitled To A Writ Of Possession**

20 The procedure for the statutory provisional remedy of claim and delivery is
 21 set forth in the California Code of Civil Procedure ("CCP") sections 511.010
 22 through 516.050, made applicable through Rule 64 of the Federal Rule of Civil
 23 Procedure. Plaintiffs may assert the remedy of claim and delivery to recover
 24 possession of personal property pending the outcome of an action. CCP §512.010;
 25 *Sea Rail Truckloads, Inc. v. Pullman, Inc.*, 131 Cal.App.3d 511, 514-5 (1982).
 26 Ownership is not the issue; the ultimate issue is the right to possession. CCP
 27 §510.010; *Walter International Corp. v. Khorsandi*, 69 Cal.App.4th 1261 (1999).
 28

1 The Court should issue the order for writ of possession if Ford Credit establishes
 2 (1) the probable validity of its claim and (2) it files an undertaking equal to the
 3 defendants' economic interest in the collateral. The statutory elements for issuing
 4 the writ of possession are as follows:

5 • Plaintiff must show that it is entitled to possession of the property that
 6 is claimed. If the right to possession is contained in a written instrument, plaintiff
 7 must attach a copy of the instrument. CCP §512.010(b)(1).

8 • Plaintiff must show that the property is wrongfully detained by the
 9 defendant and the manner in which defendant came into possession of the property.
 10 CCP §512.010(b)(2).

11 • Plaintiff must describe in detail the property it seeks to recover and its
 12 current value. CCP §512.010(b)(3).

13 • Plaintiff must include a statement of the location of the property
 14 according to the plaintiff's best knowledge, information and belief. If the property
 15 or some part of it is within a private place, which may have to be entered to take
 16 possession, the application must include a showing that there is probable cause to
 17 believe that the property is located there. CCP §512.010(b)(4); *Blair v. Pitchess*, 5
 18 Cal.3d 258, 274 (1971).

19 • Plaintiff must assert that the property has not been taken for a tax,
 20 assessment, or fine pursuant to a statute, and that it has not been seized under
 21 execution against plaintiff's property. CCP §512.010(b)(5).

22 At the hearing on the application for the writ of possession, the Court may
 23 also issue a preliminary injunction and turn over order to remain in effect until the
 24 property claimed is seized pursuant to a writ of possession. CCP §513.010(c) and
 25 CCP §512.070.

1 **1. Ford Credit Has Established The Probable Validity**
 2 **Of Its Claims To Possession Of The Collateral.**

3 The requirement that the claim has “probable validity” before a writ may
 4 issue is satisfied where it appears more likely than not that the plaintiff will obtain
 5 a judgment against the defendant on that claim. CCP §511.090. Under this section
 6 a plaintiff must establish a *prima facie* case for its claim to possession of the
 7 property. Ford Credit’s declarations establish a strong claim for Ford Credit’s
 8 entitlement to possession of the Vehicles and other secure property.

9 Here, Bob Lewis Lincoln Mercury cannot dispute (1) that Ford Credit lent it
 10 money; (2) that Bob Lewis Lincoln Mercury granted Ford Credit a security
 11 agreement in the Collateral; and (3) that Bob Lewis Lincoln Mercury has defaulted
 12 on its obligations to Ford Credit. These facts establish Ford Credit’s right to
 13 possession of the Collateral.

14 Finally, the Writ of Possession is necessary to protect Ford Credit’s interest
 15 in the Collateral. Due to Bob Lewis Lincoln Mercury’s failure to make payment to
 16 Ford Credit and failure to deliver the Collateral – despite lawful demand – the
 17 simple passage of time diminishes the value of the Collateral. The vehicles (which
 18 make up the most significant part of the Collateral) are depreciating assets which
 19 necessitate swift actions to preserve their worth, especially where the dealer has
 20 been discovered to be selling vehicles at a fast pace without paying Ford Credit its
 21 share to satisfy the inventory lien.

22 **2. The Court May Issue An *Ex parte* Writ Of Possession.**

23 California law authorizes the Court to issue a writ of possession on an *ex*
 24 *parte* basis if the defendant acquired possession of the property in the ordinary
 25 course of his trade or business for commercial purposes and:
 26

- 27 i. the property is not necessary for the support
 28 of the defendant or his family;

- ii. there is an immediate danger that the property will become unavailable to levy by reason of being transferred, concealed, or removed from the state[...]; and
- iii. the ex parte issuance is necessary to protect the property.

CCP §512.020(b)(3).

Here, the requirements of §512.020 are met. First, Bob Lewis Lincoln Mercury obtained the property in the ordinary course of business and not for personal or household purposes. Second, the vehicles are inherently mobile and subject to being moved. Bob Lewis Lincoln Mercury has already sold several vehicles out of trust and has used the sales proceeds for its own purposes without first paying its flooring lender as required under the Loan Documents. In addition, the simple passage of time diminishes the value of the vehicles. Immediate relief is necessary to protect Ford Credit's secured position.

3. The Court Should Order Bob Lewis Lincoln Mercury To Turn Over The Vehicles and Sales Income To Ford Credit.

California Code of Civil Procedure section 512.070 provides:

If a writ of possession is issued, the Court may also issue an order directing the defendant to transfer possession of the property to plaintiff. Such order shall contain a notice to the defendant that the failure to turn over possession of such property may subject the defendant to being held in contempt of court.

In addition to the above CCP Section entitling Ford Credit to an order for possession of property, the Loan Documents, themselves, require Bob Lewis Lincoln Mercury to assemble and deliver the Collateral to Ford Credit. Upon a default Ford Credit can demand that Bob Lewis Lincoln Mercury collect and assemble the Collateral:

At the request of Lender, Borrower shall assemble the Property and make it available to Lender at such place or

places as Lender may reasonably request. (Ward Declaration, Exhibit A, at ¶9(d)).

Ford Credit's security interest in the vehicles and their proceeds is sufficient grounds for ordering Bob Lewis Lincoln Mercury to turn over the sales proceeds as well as the Collateral. Bob Lewis Lincoln Mercury has misappropriated Ford Credit's funds when it refused to satisfy the inventory liens upon sale of inventory collateral. Ford Credit respectfully moves the Court for an order requiring Bob Lewis Lincoln Mercury to turn over all of the motor vehicles, their proceeds and all other secured property to Ford Credit.

4. **The Court Should Order a Preliminary Injunction to Protect the Collateral Pending Turnover or Seizure**

Ford Credit seeks a preliminary injunction directing Bob Lewis Lincoln Mercury to protect and preserve its vehicles and other secure property pending turnover or seizure.

California Code of Civil Procedure §513.010(c) provides:

[T]he court may issue a preliminary injunction to remain in effect until the property claimed is seized pursuant to the writ of possession.

This code section authorizes the Court to issue a preliminary injunction against Bob Lewis Lincoln Mercury to prevent the Collateral "from being transferred, concealed, or removed or becom[ing] substantially impaired in value" until the property may be seized through the writ of possession. California Code of Civil Procedure §513.010(b)(3). Ford Credit applies for this relief.

5. **The Court should Order the Levying Officer to Enter Dealers' Business if Necessary to Recover the Property**

Ford Credit is entitled to an order permitting the U.S. Marshal to enter the Bob Lewis Lincoln Mercury dealership – a private place – to recover possession of

1 its Collateral. Ford Credit has this right under the applicable statute and as a
 2 contract right. Under CCP §512, the Court can permit a levying officer to enter a
 3 private place if the creditor establishes probable cause that the property is there.

4 No writ directing the levying officer to enter a private
 5 place to take possession of any property shall be issued
 6 unless the plaintiff has established that there is probable
 7 cause to believe that such property is located there.
 CCP §512.060(b).

8 Ford Credit has established probable cause to believe that its Collateral is
 9 most likely located at the Bob Lewis Lincoln Mercury dealership at 911 Capitol
 10 Expressway Auto Mall, San Jose, California sales lot. (Ward, Decl. ¶25).

11 In addition to CCP §512.060(b), Bob Lewis Lincoln Mercury contracted to
 12 allow Ford Credit access to Bob Lewis Lincoln Mercury's business premises for
 13 repossession of the Vehicles. The Wholesale Agreement provides that upon
 14 default, Ford Credit may enter private places to repossess the Collateral:

15 Ford Credit shall have the right, and [Bob Lewis Lincoln
 16 Mercury] hereby authorizes and empowers Ford Credit,
 17 its agents or representatives, to enter upon the premises
 18 wherever such property may be and remove same. (Ward
 Decl., Exhibit A, Wholesale Agreement ¶ 9(d)).

19 Both the Code of Civil Procedure and the Wholesale Agreement provide authority
 20 for Ford Credit or the levying officer to enter Bob Lewis Lincoln Mercury's
 21 business locations.

22 **6. Any Re-Delivery Bond Should Be Set At The Full**
 23 **Value Of The Collateral.**

24 The purpose of the bond requirement is "to indemnify the defendant against
 25 the consequence of a taking that may later be adjudged to be wrongful." *Symes*
 26 *Cadillac Inc. v. Insurance Co. of North America*, (1977) 66 Cal.App.3d 905, 909.

Under Code of Civil Procedure section 515.010, the plaintiff's undertaking for a writ of possession is merely required if the court finds that the debtor has a real economic interest in the property:

CCP §515.010(b): If the court finds that the defendant has no interest in the property the court shall waive the requirement of the plaintiff undertaking and shall include in the order for issuance of the writ the amount of the defendant's undertaking sufficient to satisfy the requirement of subsection (b) of Section 515.020.

In this case, Bob Lewis Lincoln Mercury's actual interest in the Collateral is nonexistent, because its indebtedness to Ford Credit exceeds the value of the Collateral. If the Court requires, however, Ford Credit is prepared to file a bond in the full amount of the Collateral's value to assure itself that any redelivery bond that might be posted by Bob Lewis Lincoln Mercury will be in an amount that will provide true protection to what is left of this creditor's diminished collateral position. To permit redelivery on a bond worth less than the Collateral would be a serious injustice to Ford Credit, and it therefore requests that its own bond be at least equal to the value of the inventory to be seized. As of June 15, 2007, the total value of the Collateral subject to Ford Credit's security interest is approximately \$2,586,154.15. (Ward Decl. ¶¶ 26-27, Exhibits "F & G"). The principal amounts owed to Ford Credit under the Wholesale Agreement and Capital Loan Agreement total \$2,600,174.55. (Ward Decl. ¶ 28).

B. Ford Credit Seeks A TRO And Preliminary Injunction If The Court Does Not Issue The Writ Of Possession

If the Court does not grant the Order for Writ of Possession, Bob Lewis Lincoln Mercury will continue to sell inventory out of Trust. Ford Credit will lose both its security interest in the vehicles and in its cash collateral. Plaintiff respectfully moves the Court for a Temporary Restraining Order and Preliminary

Injunction to assure Bob Lewis Lincoln Mercury turnover of the cash collateral to Ford Credit.

1. A Temporary Restraining Order Should Issue To Protect the Collateral.

The California Code of Civil Procedure sections 511.010 through 516.050, made applicable by Federal Rules of Civil Procedure 64 and 65. Section 513.010 provides that the Court may issue a temporary restraining order to protect the creditor's position pending a noticed claim and delivery hearing if the following are found:

1. The plaintiff establishes the probable validity of his claim to possession of the properties;
2. Plaintiff provides an undertaking or bond;
3. The plaintiff establishes the probability that there is an immediate danger that the property claimed may become unavailable to levy by reason of being transferred, concealed, or removed or may become substantially impaired in value. CCP §513.010(b).

2. Ford Credit Has Established Grounds For Issuance of a TRO

As shown above, Ford Credit has established the probable validity of its claim. Bob Lewis Lincoln Mercury is in default under the terms of the Wholesale Agreement, because of its SOT sales.

As long as Bob Lewis Lincoln Mercury can continue to sell vehicles SOT, Ford Credit's security interest is being irreparably harmed by the diversion or withholding of the sales proceeds necessary to satisfy their liens. The sales proceeds represent cash collateral which could easily be applied to Ford Credit's indebtedness to satisfy its obligations under the Security Agreements.

Injunctive relief is proper in this case because Ford Credit's security interest in the rental income is easily and quickly lost as Bob Lewis Lincoln Mercury can spend the sales proceeds for other purposes. At the same time, the Vehicles are depreciating in value. Bob Lewis Lincoln Mercury has already demonstrated their unwillingness to meet their contractual obligations by refusing to surrender the Vehicles and by creating the SOT condition. An injunction should issue requiring Bob Lewis Lincoln Mercury to turn over sales proceeds upon each sale of financed inventory.

3. The TRO Must Contain Terms Which Protect Ford Credit's Interests In The Collateral.

Any TRO issued by the Court must require Bob Lewis Lincoln Mercury to protect Ford Credit's interest in the Collateral. This requires a turn over of all sales proceeds generated from the sale of vehicle inventory because this income is subject to Ford Credit's security interest ("Cash Collateral").

To protect the Cash Collateral, any injunctive relief must require Bob Lewis Lincoln Mercury to prepare a weekly accounting of all income generated by sale or lease of vehicles reasonably sufficient to permit Ford Credit to determine compliance with the accounting. Ford Credit requests a reasonable accounting to be delivered to Ford Credit each Tuesday, accounting for the week ended Saturday.

In order to protect Ford Credit's interest in the Collateral, Bob Lewis Lincoln Mercury must permit Ford Credit and its authorized agents and employees to enter upon their lots during normal business operating hours. Ford Credit seeks an order permitting it to review the cash receipts journals and bank statements on a daily basis.

In order to assure proper accounting of all income, any TRO must require Bob Lewis Lincoln Mercury to keep current all of its books, records and accounts. Ford Credit or any person designated by Ford Credit should be permitted to

1 examine Dealers' business premises and records and to copy any and all books and
 2 records, including but not limited to any computer software and hardware and other
 3 accounting programs of Bob Lewis Lincoln Mercury. Ford Credit should be
 4 permitted access for inspection of records, including but not limited to daily rental
 5 contracts, lessee agings, monthly receivable agings, collateral maintenance records,
 6 proof of insurance, proof of licensing, proof of payment of all applicable taxes, and
 7 all other records reasonably requested by Ford Credit. Ford Credit is entitled to
 8 this inspection under the Wholesale Agreement.

9 The requested injunctive relief prohibits Bob Lewis Lincoln Mercury's
 10 further diversion of the sales proceeds constituting Ford Credit's Cash Collateral.
 11 The injunctive relief directs Bob Lewis Lincoln Mercury to turn over the sales
 12 proceeds and to pay its monthly obligations under the Wholesale Agreement and
 13 begin repayment of SOT default.

14 Ford Credit has shown the probable validity of its claims and the immediate
 15 danger that Bob Lewis Lincoln Mercury may continue to sell Vehicles to
 16 consumers without delivering the proceeds of such sales to Ford Credit.
 17

18 **C. Preliminary Injunction**

19 Should the Court decide not to grant an order for writ of possession on an *ex*
 20 *parte* basis, and further declines to issue such an order after hearing, Ford Credit
 21 applies for injunctive relief to protect its interest in the Collateral during the
 22 pendency of this lawsuit. California Code of Civil Procedure § 526(a) permits a
 23 plaintiff to seek an injunction:

24 (1) When it appears by the complaint that the plaintiff is
 25 entitled to the relief demanded, and the relief, or any part
 26 thereof, consists in restraining the commission or
 continuance of the act complained of, either for a limited
 period or perpetually.

27 (2) When it appears by the complaint or affidavits that the
 28 commission or continuance of some act during the

1 litigation would produce waste, or great and irreparable
2 injury, to a party to the action.

3 Because Bob Lewis Lincoln Mercury has failed to make payments when due
4 beginning in August, 2006, and because it has sold Vehicles out-of-trust, Bob
5 Lewis Lincoln Mercury is in default under the terms of its Wholesale Agreement
6 with Ford Credit. The principal indebtedness owed under the Wholesale
7 Agreement and the Capital Loan Agreement is \$2,600,174.55. Bob Lewis Lincoln
8 Mercury has sold several vehicles without paying the amounts due and owing to
9 Ford Credit – equal to \$497,754.70. If the Court does not issue injunctive relief,
10 Ford Credit is in danger of having its secured position seriously diminished related
11 to Bob Lewis Lincoln Mercury's indebtedness. Despite demand for payment and
12 for turnover of the remaining Collateral, Bob Lewis Lincoln Mercury has failed
13 and refused to either submit payment or surrender the Vehicles and other secured
14 property. Bob Lewis Lincoln Mercury's default under its agreements, its failure to
15 keep accurate and current books and records, and its actions subsequent to that
16 default, has and will continue produce a great and irreparable injury to Ford Credit
17 if injunctive relief is not granted.

18 Similar standards for issuance of injunctive relief are required by federal law.
19 A preliminary injunction is a provisional remedy, the purpose of which is to
20 preserve status quo and to prevent irreparable loss of rights prior to final
21 disposition of the litigation. *Sierra On Line, Inc. v. Phoenix Software, Inc.* 739
22 F.2d 1415, 1422 (9th Cir. 1984). The trial court may grant a temporary restraining
23 order or preliminary injunction, in the exercise of its discretion, through its
24 equitable powers. See *Schneider v. California Department of Corrections*, 91
25 F.Supp 1316, 1327 (N.D.Cal. 2000), *citing*, *Big Country Food, inc. v. Board of*
26 *Educ. of Anchorage School Dist.*, 868 F.2d 1085, 1087 (9th Cir. 1989).
27

1 Generally, to obtain preliminary injunctive relief, a moving party must show
 2 a threat of irreparable injury and the inadequacy of legal remedies as the
 3 conventional requisites for equitable relief. *See Arcamuzi v. Continental Air Lines,*
 4 *Inc.*, 819 F.2d 935, 937 (9th Cir. 1987). In addition, the issuance of preliminary
 5 injunctive relief rests upon consideration of four factors: [1] the likelihood of the
 6 plaintiffs' success on the merits; [2] the threat of irreparable harm to the plaintiffs
 7 if the injunction is not imposed; [3] the relative balance of this harm to the
 8 plaintiffs and the harm to the defendants if the injunction is imposed; and [4] the
 9 public interest. *Los Angeles Memorial Coliseum v. National Football League*, 634
 10 F.2d 1197, 1200-01 (9th Cir. 1980).

11 The Ninth Circuit has encompassed these factors into a two-prong test. To
 12 qualify for preliminary injunctive relief, the moving party must show either [1] a
 13 likelihood of success on the merits and the possibility of irreparable injury, or [2]
 14 that serious questions going to the merits were raised and the balance of hardships
 15 tips sharply in the moving party's favor. *See Schneider*, at 1327. "These two
 16 formulations represent a continuum in which the required degree of irreparable
 17 harm increases as the probability of success decreases." *America West Airlines,*
 18 *Inc. v. National Mediation Board*, 119 F.3d 772, 777 (9th Cir. 1997) (noting that the
 19 greater the moving party's relative hardship, the less probability of success must be
 20 shown).

21 For all the reasons set forth above in support of the issuance of a TRO and
 22 writ of possession, Ford Credit satisfies the requirements for injunctive relief.
 23

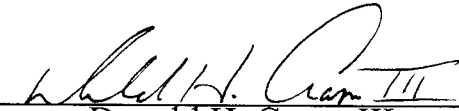
24 IV. CONCLUSION

25 Ford Credit respectfully requests that the court issue an Order for Writ of
 26 Possession and that it issue a temporary restraining order and other injunctive relief
 27

1 to restrain Bob Lewis Lincoln Mercury, its officers, employees, and agents from
2 continuing to use and profit from Ford Credit's collateral.
3

4 DATED: June 26, 2007

5 SEVERSON & WERSON
6 A Professional Corporation

7
8 By: 
9 Donald H. Cram, III


10 Attorneys for Plaintiff
11 FORD MOTOR CREDIT COMPANY,
12 LLC
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2 **ATTESTATION**

3
4 I hereby attest that I have on file all holograph signatures for any signatures
5 indicated by a "conformed" signature (/S/) within this efiled document.

6 DATED: June 26, 2007

SEVERSON & WERSON
A Professional Corporation

7
8 By: 
9 Donald H. Cram, III

10 Attorneys for Plaintiff
11 FORD MOTOR CREDIT COMPANY,
12 LLC
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28